IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO

DAVID LANE JOHNSON,	:	Case No. 5:17-cv-00047-SL
Plaintiff,	:	Judge Sara Lioi
v.	:	
NFLPA, et al.,	:	
Defendants.	:	

Plaintiff David Lane Johnson's Reply to Defendant NFLPA's Memorandum in Opposition to Plaintiff's Motion to Vacate Arbitration Award

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STATEMENT OF THE ISSUES

ISSUE 1: Should this Court vacate the Award under Section 10(a)(1) of the Federal Arbitration Act, as Defendants procured the Award by corruption, fraud, and undue means?

ISSUE 2: Should this Court vacate the Award under Section 10(a)(2) of the Federal Arbitration Act, as the arbitrator demonstrated bias and evident partiality?

ISSUE 3: Should this Court vacate the Award under Section 10(a)(3) of the Federal Arbitration Act, as the arbitrator refused to hear evidence pertinent and material to the controversy and engaged in other misbehavior that prejudiced David Lane Johnson, *which Defendant the National Football League Players Association does not contest*?

ISSUE 4: Should this Court vacate the Award under Section 10(a)(4) of the Federal Arbitration Act, as the arbitrator exceeded his powers throughout the arbitration proceeding, *which Defendant the National Football League Players Association does not contest*?

SUMMARY OF THE ARGUMENT

Plaintiff David Lane Johnson seeks to vacate the sham Arbitral Award (the "Award") orchestrated by Defendants the National Football League, the National Football League Management Council (collectively the "NFL"), and the National Football League Players Association ("NFLPA") and facilitated by the biased arbitrator (James Carter) Defendants cherry picked to hear Johnson's appeal. Per the NFL Policy on Performance-Enhancing Substances 2015 (the "Policy"), Johnson should have received a fair and transparent arbitration in accord with the Policy's written requirements. *See* Doc. No. 39-1. In reality, Johnson suffered through a biased and corrupt process, during which only Johnson abided by the Policy's requirements.

From the start, Defendants disregarded the Policy's express provisions, as they failed to seat properly an arbitrator to hear Johnson's appeal. Pursuant to this Court's *Tamarkin* decision, this reason alone warrants vacating the Award, as an improperly seated arbitrator acts outside the arbitrator's authority by issuing an award.

While Johnson seeks to vacate the Award under the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 10(a)(1)-(4),[1] the NFLPA only opposes Johnson's Motion to Vacate under §§ 10(a)(1) and (2). The NFLPA does not oppose, and thus waives, Johnson's arguments under §§ 10(a)(3) and (4), even though Johnson's arguments implicate the NFLPA's misconduct.

Regarding Johnson's § 10(a)(1) arguments, the NFLPA fails to explain Defendants' violation of the Policy's express arbitrator selection and assignment provisions. Instead, the NFLPA argues Johnson somehow waived this argument, despite not having knowledge of the violations, and by failing to ask Carter to address his fitness to serve (something not required by

[1] Johnson also seeks to vacate the Award under Section 301 of the Labor Management Relations Act. *See* Doc. No. 39 at 1760-1763. Johnson timely filed his Motion to Vacate under the FAA only, as the FAA sets a deadline to do so of "three months after the award is made or filed." 9 U.S.C. § 12. Johnson reserves the right to move later to vacate the Award based on grounds separate from the FAA and supplement his pending motion after he receives discovery, which will strengthen Johnson's arguments.

law). Further, the NFLPA ignores Johnson's argument that Defendants denied him relevant information vital to the bases of his appeal, which misbehavior Carter condoned.

Regarding Johnson's arguments under § 10(a)(2), the NFLPA, through its silence, admits Carter failed to meet his duty to provide a conflict disclosure to Johnson. Again, unable to address Carter's failure, the NFLPA attempts to argue that Johnson waived this argument and had an affirmative duty to unearth Carter's potential conflicts, without citing any authority to establish such a duty. Rather, Carter had an affirmative obligation to disclose his conflicts--which he did not. Further, Carter's pre-existing affiliation with Defendants also violated the Policy and rendered him an improperly seated arbitrator under the Policy.

Absent court intervention, Defendants have demonstrated a complete unwillingness to abide by the Policy's express written terms. For the reasons in Johnson's Motion to Vacate (Doc. No. 52) and in this Reply, this Court should vacate the Award.

LAW AND ARGUMENT

I. DEFENDANTS PROCURED THE AWARD THROUGH CORRUPTION, FRAUD, AND UNDUE MEANS IN VIOLATION OF § 10(a)(1)

The Court may vacate an arbitration award "where the award was procured by corruption, fraud, or undue means." 9 U.S.C. § 10(a)(1). Johnson demonstrated as much through Defendants disregard for the Policy's arbitrator selection/scheduling provisions and Defendants refusal to provide Johnson documents relevant to his appeal. *See* Doc. No. 52-1 at 2278-2283.

A. Defendants Violated the Arbitrator Selection/Scheduling Provisions

1. In Violation of the Policy, Only Two Arbitrators Existed

The Policy requires "no fewer than three" arbitrators to serve as hearing officers. Doc. No. 39-1 at 1796. It is undisputed that when Johnson appealed his discipline and arbitrated his

dispute, only two arbitrators served as hearing officers in violation of the Policy's express terms. Doc. No. 59 at 3339; Doc. No. 39 at 1754, ¶ 146.

Defendants claim the parties agreed to modify the Policy to decrease the minimum number of arbitrators to two. *See* Doc. No. 59 at 3355; Doc. No. 60 at 3449. The NFLPA's Constitution required it to submit any such modification to its Board of Representatives for ratification. *See* Exhibit 1 (NFLPA Constitution) at 19-20, Section 6.05. Johnson identified this and the other deviations from the Policy's express terms, which the NFLPA failed to ratify as required by its Constitution. *See* Doc. No. 52 at 2283, fn. 18. To this, the NFLPA offers no response. Rather, to the detriment of its members, the NFLPA disregards its Constitution's terms just as it disregarded the Policy's terms during Johnson's appeal.

That the NFLPA produced an alleged "amendment" to the Policy's Chief Forensic Toxicologist's ("CFT") certification requirements (*see* Doc. No. 59-9) magnifies Defendants' failure to produce a modification reducing the minimum number of Policy arbitrators to two. Rather, the evidence, or lack thereof, demonstrates no such amendment exists. Defendants also incorporated this CFT "amendment" into the 2016 policy on performance-enhancing substances ("PES"). Compare Exhibit 2 (2016 PES policy) at 28 and Doc. No. 39-1 (2015 Policy applicable here) at 1810.[2] However, Defendants did not incorporate their claimed agreement decreasing the minimum number of arbitrators to two into the 2016 PES policy. *See* Ex. 2 at 13.

The NFLPA admitted in its Memorandum in Opposition to Plaintiff's Motion to Vacate Arbitration Award ("Opposition") that Defendants only appointed a third arbitrator to hear appeals under the Policy in response to a separate proceeding in this District in late 2016 -- *Pennel Jr. v. NFLPA, et al*. *See* Doc. No. 59 at 3355 ("***because Pennel***—represented by Johnson's counsel—***sued over that very issue***, the NFL and NFLPA appointed a third arbitrator

[2] Defendants also did not incorporate this change to the 2014 PES policy into the 2015 Policy applicable here.

going forward in the interest of avoiding disputes over the matter") (emphasis added). The *Pennel* case was under the separate NFL Policy and Program on Substances of Abuse ("SOA Policy"), which includes the same requirement for "no fewer than three" unaffiliated arbitrators at issue here. Doc. No. 59-1 at 3386. Much like here, Defendants argued that they agreed to modify the SOA Policy to allow only two arbitrators but refused to provide the agreement to the player, Mr. Pennel. *See* Doc. No. 59-8 at 3428. In response, Judge Adams stated:

> I am a bit surprised by the argument that you have an agreement that says that these are the terms of the agreement. They're valid and binding, but we can modify the agreement and we don't have to disclose the modification to anyone essentially.
>
> That argument strikes me -- if that's the argument you're relying on, then that's something that cries out for some sort of hearing. Again, ***I guess my head is spinning that you can enter into an agreement and make a modification and then not disclose it to anyone***. I mean, the plaintiff is subject to the terms of this agreement. And if, in fact, you've reached some modification with the union and then to say to the plaintiff, who is subject to the arbitration, is not entitled to know about the modifications that we've reached and the details of the same, strikes me as almost a lack of fundamental fairness, and I just quite frankly don't understand that argument.

See Exhibit 3 (transcript of *Pennel* Nov. 30, 2016 proceedings) at 37:22-38:8 (emphasis added).

If Defendants modified the Policy, when pressed by Judge Adams, they could have produced the modification.[3] Instead, they appointed a third arbitrator under the SOA Policy and the 2016 PES policy (not the 2015 Policy applicable here). *See* Exhibit 4 (Defendants' Status Report from *Pennel* case) at 1, Ex. A. Despite what Defendants told Johnson, Carter, and this Court, a ratified amendment permitting only two Policy arbitrators does not exist.

2. In Violation of the Policy, Defendants Appointed the Notice Arbitrator

The Policy requires the "selected group of [three to five] arbitrators" to "designate one of its members to be the Notice Arbitrator..." Doc. No. 39-1 at 1796. In direct violation of this

[3] When asked by the Court if the NFLPA submitted the alleged "agreement" to the NFLPA's leadership for approval, the NFLPA did not know. Ex. 3 at 14:4-20.

Policy provision, Defendants admit ***they*** (not the selected arbitrators) appointed Glenn Wong as the Notice Arbitrator. *See* Doc. No. 59 at 3339 (Defendants "jointly selected Glenn Wong to serve as Notice Arbitrator"); Doc. No. 60 at 3454; Doc. No. 52-5 (Wong's appointment letter).

3. In Violation of the Policy, Defendants Assigned Johnson's Appeal

The Notice Arbitrator also is "responsible for assignment of the appeals" and is required to "ensure that at least one arbitrator is assigned to cover every Tuesday of the playing season." Doc. No. 39-1 at 1796. Defendants did not allow a proper Notice Arbitrator to assign anything, as no proper Notice Arbitrator existed. In addition, any purported Notice Arbitrator did not schedule Johnson's arbitration. Rather, ***Defendants*** assigned Johnson's appeal to their preferred arbitrator. Here, Defendants initially assigned Wong to hear Johnson's appeal and then reassigned the appeal to Carter. *See* Doc. No. 60 at 3449 ("the NFLMC and NFLPA jointly appointed Arbitrator Carter to hear Johnson's appeal…"). Per the Policy, the Notice Arbitrator ***had the sole authority*** for arbitrator scheduling and assignment. Defendants again flouted the terms of the Policy to thwart its transparent and neutral arbitrator selection process.

When Johnson sought discovery regarding arbitrator selection/assignment and how Carter and not Wong came to hear his appeal (*see* Doc. No. 52-8 at 2639, Nos. 45-47), the NFL refused to produce responsive documents (Doc. No. 52-9 at 2643), the NFLPA did not object to this deviation, and Carter condoned the Defendants' behavior—all in violation of the Policy. *See* Doc. No. 52-10 at 2647. As Johnson averred in his original Complaint (and again in his First Amended Complaint), Defendants held ex parte communications with the arbitrators:

> communications with Wong were held ex-parte and without prior notification to Johnson. These communications tainted the impartiality of the arbitration process and raise the specter of impropriety. Despite requests from Johnson, neither the NFLMC nor the NFLPA have produced documentation of all ex-parte communications with Wong.

See Doc. No. 1 at 25, ¶ 141; *see also* Doc. No. 39 at 1754, ¶ 149. In its Answer, the NFLPA admitted "it did not produce all communications with Arbitrator Wong regarding scheduling." *See* Doc. No. 28 at ¶ 141. Not only did Defendants violate the Policy's assignment and scheduling requirements, they withheld evidence of their violation from Johnson.

Johnson has demonstrated and the NFLPA has not opposed, let alone disproved, that Defendants did not select the minimum number of arbitrators required and voided the Policy's Notice Arbitrator selection and assignment provisions.[4] The NFLPA did not amend the Policy to reflect these deviations, and did not present such deviations to its membership for ratification (or even notify its members of them), as its Constitution required. Despite the NFLPA's current claim that Defendants modified Section 9 of the Policy to account for these deviations, the NFLPA previously admitted there is "no writing in which the NFLMC and NFLPA agreed to modify the 2015 Policy concerning Section 9 of the 2015 Policy." Doc. No. 28 at 1046, ¶ 168; Doc. No. 1 at 29, ¶ 168; *see also* Doc. No. 39 at 1758, ¶ 176.

In *The Tamarkin Co. v. Chauffeurs*, this Court held that a court properly vacates a labor arbitrator's award where the arbitrator "was not selected pursuant to the procedures listed in [the CBA]," the language of which was "clear and unambiguous" as to the composition of the panel from which an arbitrator must be chosen. *Tamarkin*, No. 4:09-CV-2927, 2010 U.S. Dist. LEXIS 34725, *26 (N.D. Ohio Apr. 8, 2010) (Lioi, J.).[5] Carter's appointment in violation of the Policy alone warrants vacating the Award.

B. Defendants' Refused to Provide Johnson Relevant Information

Proof of undue means under § 10(a)(1) requires evidence of bad faith by the prevailing party. *Barcume v. City of Flint*, 132 F. Supp. 2d 549, 556 (E.D. Mich. 2001) (*citing Pontiac v.*

[4] As detailed more fully below, Defendants' appointment of Carter also violated the Policy's prohibition on the appointment of arbitrators that were "affiliated with the NFL, NFLPA or Clubs." Doc. No. 39-1 at 1796.
[5] Johnson attached the unreported decisions cited herein in alphabetical order as Exhibit 11.

PaineWebber, Inc., No. 92-1972, 1993 U.S. App. LEXIS 20280, *4 (6th Cir. July 29, 1993)). As evidence of bad faith, Johnson cited to multiple instances in which Defendants, and Carter, denied him relevant information vital to his appeal. *See* Doc. No. 52-1 at 2280-2283.

For the first time, as part of the NFLPA's Opposition, Defendants provided Johnson an alleged modification to the Policy's mandated CFT certification requirements. *See* Doc. No. 59-9 at 3436-3437. The NFLPA does not explain how a modification to the "***2014 Policy*** on Performance-Enhancing Substances" (*see* Doc. No. 59-9 at 3436) (emphasis added) even concerns Johnson's arbitration under the "2015" Policy (*see* Doc. No. 39-1). The NFLPA also offers no evidence that its members ratified this modification, as required by its Constitution.[6]

The NFLPA's production of Doc. No. 59-9 is another example of a player having to take legal action to get the NFLPA, the players' union, to abide by the law, the NFLPA Constitution, and the collective bargaining agreement. Months ago, during his appeal, Johnson requested this very document from the NFLPA. Doc. No. 39 at 1773, ¶¶ 310-311; Doc. No. 53-1 at 2345, ¶ 16. That Doc. No. 59-9 even exists proves the NFLPA violated the Labor-Management Reporting and Disclosure Act and is evidence of the NFLPA's bad faith dealings with Johnson.[7]

Johnson also argued the Policy did not authorize his drug test in question. To prove his contention, Johnson sought his testing history and records. Dr. Lombardo (the Policy's supposedly neutral Independent Administrator) and the NFL refused to provide Johnson his testing history and records.

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[6] In its Reply to Johnson's Opposition to the NFLPA's Motion to Dismiss (Doc. No. 57), the NFLPA cites to its Constitution and chides Johnson for failing to recognize that the NFLPA may enter into "side letters and/or other documents … which clarify or interpret the provisions of any existing collective bargaining agreement" or are necessary for its "orderly implementation and administration." Doc. No. 57 at 3288, fn. 10. The NFLPA does not explain how a complete nullification of express neutral arbitrator requirements or an express requirement that a CFT certify all test results is a "clarification," "interpretation" or why it is "necessary" for the Policy's operation.

[7] The LMRDA required the NFLPA, "to forward a copy of each collective bargaining agreement made by such labor organization with any employer to any employee who requests such a copy and whose rights as such employee are directly affected by such agreement." 29 U.S.C. § 414. The requirement includes amendments to any such agreement.

> Johnson immediately notified the NFLPA of Lombardo's and the NFL's refusal to provide Johnson with his personal records and testing history, and reminded the NFLPA of Lombardo's "neutral" and equal obligation to the NFL and NFLPA…The NFLPA never responded to this email or took action to uphold the terms of the Policy.

Doc. No. 52-1 at 2281, fn. 14; *see* Exhibit 5 (email to the NFLPA). The Policy provides that the NFLPA could have obtained this information for Johnson, but it refused to do so. Rather than explain its inaction, the NFLPA claims this is solely an NFL issue. *See* Doc. No. 59 at 3356 ("because this claim is directed to the NFL, the NFLPA will leave it to the NFL to respond").

As part of his underlying arbitration, Johnson also sought to demonstrate the NFL could not meet its initial burden that the Policy's protocols were followed. Defendants refused to provide him the protocols (Doc. No. 52-9 at 2641-2642), as did the laboratory (Doc. No. 52-4 at 2455-2456) and Carter (Doc. No. 52-10 at 2646). It is axiomatic that, without the protocols, Johnson could not challenge whether the protocols were followed. Doc. 52-4 at 2448-2458.

In response, the NFLPA states Carter ordered the NFL to produce the protocols. *See* Doc. No. 59 at 3356.[8] However, this order is not Johnson's claimed source of corruption. Rather, the corruption and undue means stems from Carter not requiring the NFL to abide by that order, which the NFLPA leaves unaddressed.[9]

II. CARTER DEMONSTRATED EVIDENT PARTIALITY

Section 10(a)(2) of the FAA empowers a federal court to vacate an arbitration award "where there was evident partiality or corruption" of the arbitrator. 9 U.S.C. § 10(a)(2).[10] In his

[8] Carter issued this additional discovery order (dated Sept. 30, 2016) only after Johnson submitted his Pre-Hearing Statement (dated Sept. 28, 2016) that stated Carter "permitted" the NFL "to withhold documents directly relevant to Mr. Johnson's defenses" and Carter's original discovery order "did not require the NFL to produce these protocols. The NFL has not done so." Exhibit 9 (Johnson's Pre-Hearing Statement) at 1 (fn. 2), 3 (fn. 6).

[9] Carter also refused Johnson's request that Carter take an adverse inference against the NFL that the protocols were not followed, based on the NFL's refusal to produce the protocols. Doc. No. 52-4 at 2562-2563.

[10] In setting forth the standard, the NFLPA continues to cherry-pick -- this time from Johnson's brief. *See* Doc. No. 59 at 3350. Specifically, the NFLPA cites Johnson's Motion to Vacate (Doc. No. 52-1 at 2284) for the proposition that the "standard requires more than an appearance of bias." The remainder of this sentence reads, "but less than

Motion to Vacate, Johnson demonstrated Carter's evident partiality in two ways: (1) Carter's failure to make required conflict disclosures to Johnson and (2) Carter's multiple concrete actions demonstrating bias. *See* Doc. No. 52-1 at 2283-2290.

The NFLPA's only opposition to Johnson's arguments of demonstrated bias is a footnote, which miscasts Johnson's argument as asking this Court to review the merits of the Award. Doc. No. 59 at 3350, fn. 13.[11] Johnson has made no such request. Rather, in line with the controlling case law, Johnson identified the following instances in which Carter demonstrated his bias, which the NFLPA, in its silence, tacitly admits occurred: (1) Carter refused to require the NFL to produce relevant documents; (2) Carter did not apply the Policy's burden-shifting paradigm; (3) Carter relied on information he allowed the NFL to withhold from Johnson; (4) Carter refused to take an adverse inference against the NFL for its willful refusal to comply with his order to produce the Policy's protocols; and (5) Carter allowed the NFL to rely on evidence during the hearing that he denied to Johnson during discovery. *See* Doc. No. 52-1 at 2287-2290.

A party may establish an arbitrator's evident partiality by an arbitrator's demonstrated bias during the arbitration process. *Apperson v. Fleet Carrier Corp.*, 879 F.2d 1344, 1358 (6th Cir. 1989); *Thomas Kinkade Co. v. White*, 711 F.3d 719, 723-724 (6th Cir. 2013). The analysis requires a "case-by-case objective inquiry." *Nationwide Mutual Ins. Co. v. Home Ins.*, 429 F.3d 640, 645 (6th Cir. 2005).[12]

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actual bias" and cites to *Hardy Indus. Techs., LLC. v. BJB LLC*, No. 1:12 CV 3097, 2016 U.S. Dist. LEXIS 174219, *8-9 (N.D. Ohio Dec. 16, 2016) and not *Uhl v. Komatsu Forklift Co.* as the NFLPA suggests.

[11] The NFLPA miscites the only case citation in this footnote -- *Grego v. Nexagen USA LLC*, No. 5:10cv2691, 2011 U.S. Dist. LEXIS 76966 (N.D. Ohio Jul. 15, 2011)(Lioi, J.) – by suggesting the case stands for the proposition that a party may not use an arbitrator's underlying decisions to support an evident partiality argument. Rather, *Grego* supports Johnson's position that a party may demonstrate arbitrator bias by pointing to the arbitrator's misconduct. *Id.* at *13 ("[s]ince 'evident partiality' is one of the statutory grounds for overturning an award, the Court will examine [the two instances in which the arbitrator allegedly showed partiality]").

[12] Under the NFLPA's flawed theory, *see* Doc. No. 59 at 3350, fn. 13, Johnson is precluded from demonstrating bias by pointing to events that transpired during the arbitration. This argument defies logic.

As explained in Johnson's Motion to Vacate (Doc. No. 52-1 at 2290), much like the *Kinkade* case, this Court should vacate the Award based on the "convergence of undisputed facts that, considered together, show a motive for [the arbitrator] to favor the [nonmoving party] and multiple, concrete actions in which he appeared actually to favor them." *Kinkade*, 711 F.3d at 724. Again, the NFLPA offers no rebuttal to Johnson's demonstrated bias arguments or to the application of *Kinkade's* holding here. This Court should grant Johnson's Motion to Vacate under 9 U.S.C. § 10(a)(2) based on Carter's demonstrated bias.

A. Carter Alone Had the Duty to Disclose, and He Violated that Duty

It is a "simple requirement that arbitrators disclose to the parties any dealings that might create an impression of possible bias." *Commonwealth Coatings v. Cont'l Casualty Co.*, 393 U.S. 145, 149 (1968). Carter, in his own book, recognized this requirement. Doc. No. 52-14 at 2661-2662.[13] Yet, Carter failed to make ***any*** disclosures in this proceeding.

The Supreme Court, national arbitration governing bodies, and Carter himself place the duty to disclose on the arbitrator. The NFLPA attempts to address Carter's violation of his duty in another footnote. *See* Doc. No. 59 at 3351, fn. 15. Specifically, the NFLPA suggests Carter

[13] The NFLPA attempts to argue that an arbitrator's failure to disclose potential conflicts in violation of the AAA canons are "not a proper basis to find evident partiality," citing to *Lifecare Int'l, Inc. v. CD Med., Inc.*, 68 F.3d 429 (11th Cir. 1995) and *Merit Ins. Co. v. Leatherby Ins. Co.*, 714 F.2d 673 (7th Cir. 1983). *See* Doc. No. 59 at 3351, fn. 15. Both of these cases are distinguishable. In *Lifecare*, the arbitrator made a disclosure, just an incomplete disclosure that did not mention a personal disagreement with an attorney at the same firm representing one of the parties (but who was not involved in the arbitration) and having become of counsel at a firm which the losing party had contacted about representation 18 months before the arbitration. *Lifecare*, 68 F.3d at 432-433. In *Leatherby*, the court did not find evident partiality where the arbitrator failed to disclose he worked with one of the parties at an unrelated company 17 years before the arbitration and had not spoken to him since. *Leatherby*, 714 F.2d at 676-677. Here, Carter has made no disclosure and his conflicts through WilmerHale were longstanding and ongoing as of the date of Johnson's proceeding. A decision factually similar to this matter distinguished *Leatherby* on grounds that, unlike the matter before it, the arbitration agreement in *Leatherby* did not require that the designated arbitrators be "disinterested" and stated that the facts before it were more akin to the U.S. Supreme Court's decision in *Commonwealth Coatings* where the "neutral arbitrator had "sporadic but continuing business dealings with a party to the arbitration until about a year before the arbitration." *See Int'l Ins. Co. v. Certain Underwriters*, No. 88 C 9838, 1992 U.S. Dist. LEXIS 22851, *6 (N.D. Ill. Sept. 8, 1992). Like the arbitration agreement at issue in *Int'l Ins. Co.*, the Policy ***required*** that arbitrators be "unaffiliated" with the NFL, NFLPA and NFL clubs, thus enhancing Carter's obligation to disclose disqualifying affiliations. Doc. No. 39-1 at 1796.

could make an advance conflict waiver to Defendants in lieu of making one to Johnson. However, this argument fails legally and factually, as the NFLPA provides no evidence Carter made any disclosure to Johnson, whether "advance" or otherwise. Further, the NFLPA does not deny that Carter has evident conflicts.[14]

Despite the fact that Carter identified Johnson as a party to the proceeding, the NFLPA tacitly admits Carter made absolutely no disclosures to Johnson. Doc. No. 52-2 at 2295.[15] Moreover, the NFLPA does not contest Johnson's assertion that Carter had conflicts to disclose. Doc. No. 52-15. Instead, the NFLPA attempts to place a "due diligence" burden on Johnson to root out potential conflicts between Carter, his law firm, and Defendants. The NFLPA cites no authority for this illogical proposition.

The NFLPA cites *Uhl v. Komatsu Forklift Co, LTD*, 466 F. Supp. 2d 899, 907 (E.D. Mich. 2006) for the proposition Johnson had a duty to investigate. Doc. No. 33 at 1344. In *Uhl*, plaintiff alleged the arbitrator engaged in fraud by keeping alleged business relationships from him, relationships the court deemed "attenuated by the passage of time." *Uhl*, 466 F. Supp. 2d at 906-907. The evidence also indicated plaintiff had specific knowledge of this relationship years prior to the arbitration but failed to raise this knowledge during the arbitration proceeding. There is no evidence Johnson had similar knowledge before or during his arbitration proceeding.

The NFLPA cites to *Pontiac*, 1993 U.S. App. LEXIS 20280 at *10 for the same proposition. However, the issue in *Pontiac* was plaintiff's claim that an arbitration award should be vacated due to fraud ***on the part of the opposing party***, not the arbitrator. *Id*. at *10.

[14] The NFL claims, without evidence, that "it is undisputed that the NFLPA, Johnson's union, knew of Arbitrator Carter's association with WilmerHale at the time it agreed to his appointment under the Policy." Doc. No. 60 at 3458. The NFL's unproven assertion regarding the NFLPA does not explain why Carter did not disclose his affiliation with the NFL and NFLPA under the SOA Policy, the full terms of his employment with WilmerHale, or the WilmerHale's full work for the NFL, the NFLPA, or NFL clubs to Johnson, who, unlike the NFLPA, Carter recognized as a party to the proceeding.

[15] Importantly, Carter did not identify the NFLPA as a "party" in the Award. Doc. No. 52-2 at 2295.

Contrary to the fable put forth by the NFLPA, Carter (not Johnson) had to identify fully and timely any facts suggesting partiality. Carter (not Johnson) failed to do so.

B. In Violation of the Policy, Carter Was Affiliated with the Defendants

The Policy required Defendants to appoint "third-party arbitrators ***not affiliated with the NFL, NFLPA or Clubs***." Doc. No. 39-1 at 1796 (emphasis added).[16] Unbeknownst to Johnson, and in violation of the Policy, Carter also serves as an arbitrator under the SOA Policy, which includes the same "affiliated" arbitrator preclusion. *See* Doc. No. 59-1 at 3386. The Policy does not define "affiliated," which has a dictionary definition of "being in close formal or informal association." http://www.dictionary.com/browse/affiliated (last visited Apr. 25, 2017). Serving as an arbitrator under a different policy certainly meets this definition.

The NFLPA offers conflicting definitions of "affiliated" in its Opposition -- first defining it as meaning "employed by" (Doc. No. 59 at 3339) and later as "neutral" (Doc. No. 59 at 3352). Neither explanation is plausible. Since at least 2014, The NFLPA recognized "employed by" and "affiliated" to mean two different things. *See* Exhibit 6 (NFLPA recusal request) at 2 (NFLPA argues "no individual ***employed by or affiliated*** with the NFL can arbitrate") (emphasis added). Had the Defendants meant to use the term "neutral" they could have done so, as they did when describing the Policy's CFT (Doc. No. 39-1 at 1787) and Independent Administrator (Doc. No. 39-1 at 1786). Instead, the Policy uses the term "affiliated."

Regardless of the "affiliated" definition the NFLPA contrives, Carter should have disclosed to Johnson his joint service as an arbitrator under both the Policy and the SOA Policy, as it reflects relationships raising reasonable doubts about Carter's impartiality. Yet, Carter

[16] By the definitions set forth in each policy, the Policy and SOA Policy ***are separate policies***. *See* Doc. No. 39-1 at 1784 (Policy defined to include only the "Policy on Performance-Enhancing Substances"); Doc. No. 59-1 at 3364 (SOA Policy defined to include only the "policy regarding substance abuse").

made no disclosure whatsoever. Doc. No. 39 at 1764-1765, ¶¶ 235-238. The NFLPA does not contest that Carter had a duty to disclose this relationship to Johnson or that he violated his duty.

Even more glaring, in the *Pennel* matter, Carter provided a partial conflict disclosure only after Mr. Pennel specifically challenged Carter. Doc. 52-15 at 2663. In that disclosure, Carter stated he knew his law firm, WilmerHale, ***presently represented the NFL*** and gave advice "to the NFL with respect to a team ownership matter..." Doc. No. 52-15 at 2663. Contrary to the NFLPA's assertion, ***no*** amount of due diligence or Google searching could have uncovered WilmerHale's ***current*** representation of the NFL with respect to this team ownership matter. Indeed, the NFLPA completely glosses over this ***direct undisclosed conflict***. Notably, Carter's partial disclosure to Mr. Pennel neither identifies his pecuniary interests in that representation nor does it affirmatively state that firm attorneys engaged in that representation would have no involvement with Carter's activities as an arbitrator for Defendants. Regardless, Carter made that disclosure in the *Pennel* matter (*see* Doc. No. 52-5) months after he issued his Award in this proceeding (*see* Doc. No. 52-2) and never made this or any disclosure to Johnson.

In another recent matter involving the NFLPA, the U.S. District Court for the Central District of California vacated an arbitration award where the "impartial" and supposedly neutral NFLPA-appointed arbitrator failed to disclose his affiliation with one of the parties (Rosenhaus) to the other party (Jackson).[17] *See Rosenhaus v. Jackson*, No. CV-14-3154-MWF (JCGx), 2016 U.S. Dist. LEXIS 122398 (C.D. Cal. Feb. 26, 2016).[18] Jackson employed Rosenhaus as his agent and the two arbitrated a dispute through the NFLPA's arbitration procedure. *Id*. at *3-4. The NFLPA appointed Roger Kaplan to hear the appeal. *Id*. at *6. While known to the NFLPA but unbeknownst to Jackson until after his arbitration hearing, Rosenhaus had engaged Kaplan to

[17] Jackson, like Johnson and Pennel, also is an active NFL player.

[18] Prior to vacating the award, the *Rosenhaus* court permitted discovery, including depositions, on the issue of evident partiality. *Id*. at *8-9.

hear a separate private mediation. *Id*. at *6-7. Based upon Kaplan's failure to disclose this service alone, the court vacated the award under the FAA for evident partiality. *Id*. at *26.

The facts of *Rosenhaus* are strikingly similar to those here, and this Court should reach the same result. *See also P.H. Glatfelter v. United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Indust. And Svc. Wkrs Int'l Union*, No. 2:11-cv-741, 2012 U.S. Dist. LEXIS 118189, *14 (S.D. Ohio Aug. 21, 2012) (court vacated an arbitration award for evident partiality where the arbitrator knew of, but did not disclose multiple, distant familial relationships between himself and one party to an arbitration).

III. JOHNSON HAS WAIVED NOTHING

Unable to refute the merits of Johnson's §§ 10(a)(1) and 10(a)(2) arguments, the NFLPA attempts to rebut them by alleging Johnson somehow waived these arguments during the underlying arbitration. "[T]he party claiming waiver carries the burden of proof." *Tamarkin*, 2010 U.S. Dist. LEXIS 34725 at *26 (*citing Nationwide*, 330 F.3d at 846). The NFLPA fails to carry its burden, as (1) it was impossible for Johnson to have waived conflicts of which he had no knowledge and (2) Johnson regularly objected to Carter's service.

A. Carter and Defendants Denied Johnson Information Concerning the Selection and Assignment of Arbitrators

Johnson sought documents identifying the Policy's arbitrators, including the selection and assignment of arbitrators. Doc. No. 52-8 at 2638-2639, Nos. 45-47. The NFL and NFLPA refused to provide Johnson with that information. When he then sought the information through discovery, Carter denied his requests, ruling, "[t]hese requests are not directed at the basis for the notice of discipline to Mr. Johnson." Doc. No. 52-10 at 2647.

Johnson argued he had no involvement in arbitrator scheduling decisions because the NFLPA and NFL did not include him in those discussions. Doc. No. 52-6 at 2605-2608, 2611.

Accordingly, Carter knew that Defendants violated the Policy's arbitration selection and assignment terms but would not grant Johnson access to information about those violations. The NFLPA even went so far as to withhold from Johnson its *ex parte* communications with the arbitrators. *See* Doc. No. 28 at ¶ 141. Johnson, in his Pre-Hearing Statement continued his objection that "the NFL was permitted to withhold documents directly relevant to [his] defenses." *See* Ex. 9 at 1, fn. 2.

B. Johnson Timely and Extensively Raised the Arbitrator Selection and Assignment Issue

In a submission to Defendants and Carter, Johnson unequivocally objected to Defendants violation of the Policy's arbitration selection and assignment provisions:

> Again, the NFL seeks to enforce the Policy strictly against Mr. Johnson, while refusing to provide evidence of its adherence to the Policy or legitimate grounds for known deviations. Specifically, the Policy requires the NFL to "select...no fewer than three but no more than five arbitrators to act as hearing officers for appeals under Section 6..." Policy at 13. This group of arbitrators is to select a Notice Arbitrator, who is responsible for assigning one arbitrator "to cover every Tuesday of the playing season through the Super Bowl." Additionally, "[a]ppeals will automatically be assigned to the arbitrator assigned to cover the fourth Tuesday following the date on which the Payer is notified of discipline." Policy at 13. This integral provision has not been followed. Mr. Johnson is entitled to an explanation as to why. Requests 45, 46, and 47 seek to determine whether the NFL has abided by the requirements in the Policy, particularly as it relates to the assignment of the arbitrator to hear his Section 6 discipline appeal.

Exhibit 7 (Johnson's Sept. 21, 2016 letter) at 6; *see also* Doc. No. 52-4 at 2467 (Johnson incorporating into the hearing arbitration his "initial submissions in this case, including the discovery call, as well as [his] letter dated October the 1st");[19] Doc. No. 52-6 at 2605; Doc. No. 59-4 at 3413. Carter denied Johnson's request in its entirety. Doc. No. 52-10 at 2647.

As in *Tamarkin*, Johnson objected about arbitrator selection and assignment issues. Indeed, as this Court observed, "asking an arbitrator to pass judgment on the propriety of his own selection under a CBA raises ***serious conflict of interest issues***." *Id*. at *27, fn. 4 (emphasis

[19] Johnson's October 1, 2016 letter reiterates in detail Johnson's objections to the NFL's refusal to produce the CFT "modification" and Policy protocols. *See* Doc. No. 61-10.

added). In an earlier Memorandum Opinion and Order in *Tamarkin*, this Court explained that, "the arbitrator cannot be the judge of his own authority . . . [and] it is eminently unreasonable for the parties to have expected that an arbitrator would decide a question of whether that arbitrator was properly selected or appointed under the CBA." *See* Exhibit 8 (*Tamarkin* Memorandum Opinion and Order) at 178079.

Accordingly, having raised the issue of arbitrator selection and assignment at the outset of the arbitration process, receiving no discovery about arbitrator selection/assignment from Defendants or Carter despite Johnson's requests, and Johnson's incorporation of his previous objections during the hearing, Johnson absolutely preserved the issue for a Motion to Vacate.

Tellingly, the NFLPA falsely told Johnson that they amended the terms of the Policy as to the three arbitrator requirement during Johnson's arbitration proceeding. Not surprisingly, the NFLPA since has admitted no such written amendment exists. That the NFLPA now chastises Johnson based upon its own fraud is absurd and reeks of bad faith.

C. Absent Knowledge of Carter's Undisclosed Conflicts, Johnson Could Not Waive Them

The NFLPA builds nearly the entirety of its waiver argument on the tenuous foundation that Johnson acknowledged Carter's "qualifications." Accepting an arbitrator's qualifications differs from waiving possible conflicts, particularly when the arbitrator fails to make a conflict disclosure or otherwise allow discovery on the matter.

The NFLPA repeatedly emphasizes that Johnson did not question Carter's "qualifications" to be an arbitrator. Doc. No. 59-1 at 3344, 3349. Johnson acknowledges this. Eluding the NFLPA, however, is the distinction between an arbitrator's objective "qualification" and "impartiality." *See Nationwide*, 429 F.3d at 646, fn.8 (*citing Merit Ins. Co. v. Leatherby Ins. Co.*, 714 F.2d 673, 679 (7th Cir. 1983) (describing the distinction between an arbitrator's

"impartiality" and "expertise")). Carter's credentials may suggest his ability to hear the dispute, but, because Carter failed to disclose his conflicts, Johnson could not waive any conflict.

Further, Johnson did not "choose" Carter as the NFLPA misleads this Court. Johnson only chose to proceed in person. *See* Doc. No. 59-4.[20] That is a ***guaranteed right*** under the Policy. Doc. No. 39-1 at 1799.[21] For the NFLPA to suggest that Johnson's right to proceed in person somehow amounted to a choice of Carter is absurd.[22] The NFL's statement that ***Defendants*** "jointly appointed Arbitrator Carter to hear Johnson's appeal…" further undermines the NFLPA's position. *See* Doc. No. 60 at 3449.

Moreover, the NFLPA cites to Johnson's counsel's statement that Johnson is "amenable to changing the arbitrator" for the false proposition Johnson selected Carter. *See* Doc. No. 59 at 3342-3343. The actual email in context says something much different:

> Mr. Johnson is a party to the appeal of his discipline. While he is amenable to changing the arbitrator, we are confused as to how "the parties" agreed to change the arbitrator absent our agreement or involvement in any communication regarding the change. Arbitrator Wong and Arbitrator Carter aside, please identify the at least one other available arbitrator required by Section 9 of the NFL Policy on Performance-Enhancing Substances 2015.

See Doc. No. 59-4 at 3413. The NFLPA cherry-picks from emails much like Defendants cherry-picked Carter to hear Johnson's appeal.

During the arbitration process, Johnson did not have knowledge of Carter's direct and indirect affiliation to the NFL and the NFLPA. The evidence demonstrates, and the NFLPA does not contest, that Carter failed to disclose potential evidence of partiality. Carter's actions in

[20] The Policy's default is an in-person hearing, but the parties may agree to conduct the hearing "by conference call." Doc. No. 39-1 at 1799.

[21] Indeed, even if the Policy had properly seated arbitrators (which it does not), nowhere does the NFLPA or the NFL explain why Wong, the originally scheduled arbitrator, could not have heard Johnson's appeal in person on a different date.

[22] Equally absurd is the NFLPA's repeated suggestion throughout this litigation and again in its Opposition (without any citation to the record) that "Johnson admitted to violating the PES Policy." *See* Doc. No. 59 at 3338. This never happened. At most, Johnson admitted to ingesting an unknown substance he thought was acceptable after he checked the substance using a service recommended by the NFLPA. *See* Doc. No. 52-4 at 2378-2381; Ex. 9 at 6.

the *Pennel* matter demonstrate that Carter knew he should have made a disclosure to Johnson. Additionally, while Johnson knew that Carter worked at the WilmerHale law firm, Carter completely failed to disclose any potential and actual conflicts.[23] Johnson could not waive conflicts of which he had no knowledge. *See HSMV Corp. v. ADI Ltd.*, 72 F. Supp. 2d 1122, 1131 (C.D. Cal. 1999) (*citing Gilbert v. Nat'l Corp. for Hous. Partnerships*, 71 Cal. App. 4th 1240, 84 Cal. Rptr. 2d 204 (1999)) ("'as a threshold matter one must know of, understand and acknowledge the presence of a conflict of interest before one can' waive the conflict"); *see also Tamarkin*, 2010 U.S. Dist. LEXIS 34725 at *23 (a party may "waive its objection to the jurisdiction of the arbitrators" only if the party "has knowledge of the possible defect").

The NFLPA cites *Apperson* for the proposition that objections to an arbitrator's partiality generally are waived unless raised in the arbitration. *Apperson*, 879 F.2d at 1358-59; Doc. No. 59 at 3345-3346. Yet, knowledge of the underlying conflict is a necessary predicate to a party raising an objection. Nevertheless, Johnson repeatedly raised issues related to the arbitrator throughout the proceeding *See* Ex. 7; Ex. 9; Ex. 10; Doc. No. 52-6 at 2605-2608; Doc. No. 52-4 at 2467. Carter failed to disclose to him his actual and potential conflicts. Johnson only learned of Carter's actual conflict by virtue of Carter's subsequent *Pennel* disclosure.

D. Johnson Was Not Required to Raise These Issues

Even assuming Johnson failed to raise these issues, which he did not, he was not required to do so. As the Sixth Circuit recently explained: "[parties] to an arbitration generally may not challenge the fairness of the proceedings or the partiality of the arbitrators until the conclusion of

[23] In this case, Johnson brings claims against both the NFLPA and the NFL alleging misconduct, including refusal to provide Johnson with vital information that rendered the arbitration process inherently unfair and tainted the Award. Johnson further alleges that Carter's evident partiality was manifested by his demonstrated bias during the arbitration process. Accordingly, since the NFLPA joined the NFL in denying Johnson access to information and failing to abide by express Policy terms, Carter's demonstrated evident partiality was motivated by his ties to both the NFLPA and the NFL.

the arbitration and the rendition of the final award." *Savers Prop. & Cas. Ins. Co. v. Nat'l Union Fire Ins. Co.*, 748 F.3d 708, 716 (6th Cir. 2014). The Sixth Circuit went on to explain:

> ***Although the FAA provides that a court can vacate an award where there was evident partiality or corruption in the arbitrators, it does not provide for pre-award removal of an arbitrator.***

Id. at 720 (emphasis added; citations, brackets, and internal quotation marks omitted).

Citing the Fifth Circuit's decision in *Gulf Guar. Life Ins. v. Conn. Gen. Life Ins. Co.*, 304 F.3d 476, 491 (5th Cir. 2002), the *Savers* Court further explained that "courts may adjudicate claims regarding the partiality of an arbitrator prior to issuance of a final award '*only* when there is a claim…that there was 'fraud in the inducement' or some other infirmity in the contracting process' regarding the parties' establishing arbitral qualifications' that could serve to invalidate the agreement to arbitrate.'" *Id*. at 720 (emphasis in original). Based on these principles the Sixth Circuit concluded the plaintiff properly raised challenges to the fairness of the arbitration proceedings and partiality of the arbitrator in a motion to vacate under FAA Section 10. *Id*. Johnson's Motion to Vacate is in accord with the Sixth Circuit's holding in *Savers*.

IV. THE NFLPA DOES NOT OPPOSE JOHNSON'S MOTION TO VACATE UNDER SECTIONS 10(a)(3) AND 10(a)(4) OF THE FAA

The NFLPA provided no opposition to Johnson's arguments under 9 U.S.C. § 10(a)(3), which detailed Carter's denial of relevant evidence to Johnson in direct violation of the express terms of the Policy. *See* Doc. No. 52-1 at 2290-2292. Likewise, the NFLPA provided no opposition to Johnson's arguments under 9 U.S.C. § 10(a)(4) that Carter exceeded his powers by refusing to abide by the burden-shifting paradigm required by the Policy, denied Johnson evidence demonstrating his improper appointment under the Policy, and created limitations on discovery not contemplated by the Policy, among Carter's other gross exercises of power. *See* Doc. No. 52-1 at 2292-2293.

As the NFL and Carter ran roughshod over the Policy's requirements, the NFLPA sat silent. Rather than explain itself now, the NFLPA continues to sit silent, stating only that it "will not address Johnson's arguments about the substance or process of the arbitration itself." Doc. No. 59 at 3338.

"'It is well understood . . . that when a [party] files an opposition to a dispositive motion and addresses only certain arguments raised by the [moving party], a court may treat those arguments that the [party] failed to address as conceded.'" *Lewis v. Cleveland Clinic Found.*, No. 1:12 CV 3003, 2013 U.S. Dist. LEXIS 168836, at *11 (N.D. Ohio Nov. 27, 2013) (*quoting Cunningham v. Tennessee Cancer*, 957 F. Supp. 2d 899 (E.D. Tenn. July 12, 2013)). To the extent this Court even needs to reach Johnson's arguments under §§ 10(a)(3) or 10(a)(4), the NFLPA has conceded these claims, and this Court should grant Johnson's Motion to Vacate under §§ 10(a)(3) and 10(a)(4).

CONCLUSION

That the NFLPA, Johnson's own union, even opposes his Motion to Vacate speaks volumes about its motives and allegiance and should tell this Court all its needs to know about the extent of the NFLPA's manipulation and the lack of cooperation and assistance Johnson received from the NFLPA during his appeal. For the foregoing reasons, Johnson respectfully requests that this Court grant his Motion to Vacate (Doc. No. 52). If the Court feels oral argument is appropriate, Johnson requests such argument.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 7.1

The undersigned certifies that this matter has yet to be assigned a track and that this filing adheres to the 20-page limitation set forth in Local Rule 7.1(f) for unassigned cases. This filing also adheres to the page limitations set forth in the Initial Standing Order (Doc. No. 8).

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CERTIFICATE OF SERVICE

The undersigned certifies that on April 28, 2017 the foregoing was filed using the Court's CM/ECF system. All parties and counsel of record will receive notice and service of this document through the Court's CM/ECF electronic filing system.

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